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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 JUSTIN LUJAN WETHERBEE,

10 NO. C12-113-JPD

11 Plaintiff,

12 v.

13 ORDER

14 MICHAEL J. ASTRUE, Commissioner of
15 Social Security,

16 Defendant.

17 Plaintiff Justin Lujan Wetherbee appeals the final decision of the Commissioner of the
18 Social Security Administration (“Commissioner”) which denied his applications for Disability
19 Insurance Benefits (“DIB”) under Title II of the Social Security Act, 42 U.S.C. §§ 401-33,
20 after a hearing before an administrative law judge (“ALJ”). For the reasons set forth below,
21 the Commissioner’s decision is AFFIRMED.

22 I. FACTS AND PROCEDURAL HISTORY

23 At the time of the administrative hearing, plaintiff was a 26 year-old man with a high
24 school education. Administrative Record (“AR”) at 67, 78. His past work experience includes
employment as in the Army, and as a security guard/traffic controller. AR at 17. Plaintiff was
last gainfully employed in 2009. AR at 12.

On July 10, 2009, plaintiff filed a claim for DIB, alleging an onset date of June 30, 2009. AR at 10. Plaintiff asserts that he is disabled due to Lisfranc fracture in right foot, status post tarsometatarsal fusion in the right foot, degenerative joint disease and degenerative joint disease in joints adjacent to the midtarsal joint. AR at 12-13.

The Commissioner denied plaintiff's claim initially and on reconsideration. AR at 10. Plaintiff requested a hearing which took place on June 9, 2010. AR at 47-92. On July 9, 2010, the ALJ issued a decision finding plaintiff not disabled and denied benefits based on her finding that plaintiff could perform his past relevant work and additional jobs existing in significant numbers in the national economy. AR at 10-19. Plaintiff's administrative appeal of the ALJ's decision was denied by the Appeals Council, AR at 1-3, making the ALJ's ruling the "final decision" of the Commissioner as that term is defined by 42 U.S.C. § 405(g). Plaintiff timely filed the present action challenging the Commissioner's decision. Dkt. No. 5.

II. JURISDICTION

Jurisdiction to review the Commissioner's decision exists pursuant to 42 U.S.C. §§ 405(g) and 1383(c)(3).

III. STANDARD OF REVIEW

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits when the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 (9th Cir. 2005). "Substantial evidence" is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). The ALJ is responsible for determining credibility, resolving conflicts in medical testimony, and resolving any other ambiguities that might exist. *Andrews v. Shalala*,

1 53 F.3d 1035, 1039 (9th Cir. 1995). While the Court is required to examine the record as a
 2 whole, it may neither reweigh the evidence nor substitute its judgment for that of the
 3 Commissioner. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002). When the evidence is
 4 susceptible to more than one rational interpretation, it is the Commissioner's conclusion that
 5 must be upheld. *Id.*

6 The Court may direct an award of benefits where "the record has been fully developed
 7 and further administrative proceedings would serve no useful purpose." *McCartey v.*
 8 *Massanari*, 298 F.3d 1072, 1076 (9th Cir. 2002) (citing *Smolen v. Chater*, 80 F.3d 1273, 1292
 9 (9th Cir. 1996)). The Court may find that this occurs when:

10 (1) the ALJ has failed to provide legally sufficient reasons for rejecting the
 11 claimant's evidence; (2) there are no outstanding issues that must be resolved
 12 before a determination of disability can be made; and (3) it is clear from the
 record that the ALJ would be required to find the claimant disabled if he
 considered the claimant's evidence.

13 *Id.* at 1076-77; *see also Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (noting that
 14 erroneously rejected evidence may be credited when all three elements are met).

15 IV. EVALUATING DISABILITY

16 As the claimant, Mr. Wetherbee bears the burden of proving that he is disabled within
 17 the meaning of the Social Security Act (the "Act"). *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th
 18 Cir. 1999) (internal citations omitted). The Act defines disability as the "inability to engage in
 19 any substantial gainful activity" due to a physical or mental impairment which has lasted, or is
 20 expected to last, for a continuous period of not less than twelve months. 42 U.S.C. §§
 21 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled under the Act only if his impairments are
 22 of such severity that he is unable to do his previous work, and cannot, considering his age,
 23 education, and work experience, engage in any other substantial gainful activity existing in the
 24

1 national economy. 42 U.S.C. §§ 423(d)(2)(A); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098-
2 99 (9th Cir. 1999).

3 The Commissioner has established a five step sequential evaluation process for
4 determining whether a claimant is disabled within the meaning of the Act. *See* 20 C.F.R. §§
5 404.1520, 416.920. The claimant bears the burden of proof during steps one through four. At
6 step five, the burden shifts to the Commissioner. *Id.* If a claimant is found to be disabled at
7 any step in the sequence, the inquiry ends without the need to consider subsequent steps. Step
8 one asks whether the claimant is presently engaged in “substantial gainful activity.” 20 C.F.R.
9 §§ 404.1520(b), 416.920(b).¹ If he is, disability benefits are denied. If he is not, the
10 Commissioner proceeds to step two. At step two, the claimant must establish that he has one
11 or more medically severe impairments, or combination of impairments, that limit his physical
12 or mental ability to do basic work activities. If the claimant does not have such impairments,
13 he is not disabled. 20 C.F.R. §§ 404.1520(c), 416.920(c). If the claimant does have a severe
14 impairment, the Commissioner moves to step three to determine whether the impairment meets
15 or equals any of the listed impairments described in the regulations. 20 C.F.R. §§ 404.1520(d),
16 416.920(d). A claimant whose impairment meets or equals one of the listings for the required
17 twelve-month duration requirement is disabled. *Id.*

18 When the claimant’s impairment neither meets nor equals one of the impairments listed
19 in the regulations, the Commissioner must proceed to step four and evaluate the claimant’s
20 residual functional capacity (“RFC”). 20 C.F.R. §§ 404.1520(e), 416.920(e). Here, the
21 Commissioner evaluates the physical and mental demands of the claimant’s past relevant work

22 _____
23 ¹ Substantial gainful activity is work activity that is both substantial, i.e., involves
24 significant physical and/or mental activities, and gainful, i.e., performed for profit. 20 C.F.R. §
404.1572.

1 to determine whether he can still perform that work. 20 C.F.R. §§ 404.1520(f), 416.920(f). If
2 the claimant is able to perform his past relevant work, he is not disabled; if the opposite is true,
3 then the burden shifts to the Commissioner at step five to show that the claimant can perform
4 other work that exists in significant numbers in the national economy, taking into consideration
5 the claimant's RFC, age, education, and work experience. 20 C.F.R. §§ 404.1520(g),
6 416.920(g); *Tackett*, 180 F.3d at 1099, 1100. If the Commissioner finds the claimant is unable
7 to perform other work, then the claimant is found disabled and benefits may be awarded.

V. DECISION BELOW

On July 9, 2010, the ALJ issued a decision finding the following:

1. The claimant meets the insured status requirements of the Social Security Act through December 31, 2013.
 2. The claimant has not engaged in substantial gainful activity since June 30, 2009, the alleged onset date.
 3. The claimant has the following severe impairments: Lisfranc fracture in right foot, status post tarsometatarsal fusion in the right foot, and degenerative joint disease.
 4. The claimant does not have an impairment or combination of impairments that meets or medically equals one of the listed impairments in 20 CFR Part 404, Subpart P, Appendix 1.
 5. After careful consideration of the entire record, I find that the claimant has the residual functional capacity to perform light work as defined in 20 CFR 404.1567(b) except he is able to stand/walk for up to 2 hours per day for 30 minutes at a time with the option to sit down at his work station for a few minutes between standing/walking periods; he must avoid walking on rough surfaces; he is able to sit without restriction; he is able to perform all postural movements occasionally (bend, stoop, crouch, kneel, ascend and descend stairs/ramps) except he cannot climb ladders, ropes, or scaffolding and he cannot balance; he is able to only frequently push or pull with his right lower extremity, such as foot pedals and foot controls; and he must avoid hazards like heights. He has no other limitations or restrictions.
 6. The claimant is capable of performing past relevant work as a security guard/traffic controller. This work does not require the performance

1 of work-related activities precluded by the claimant's residual
2 functional capacity.

- 3
- 4 7. The claimant has not been under a disability, as defined in the Social
5 Security Act, from June 30, 2009, through the date of this decision.

6 AR at 12-18.

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8 VI. ISSUES ON APPEAL

9 The principal issues on appeal are:

- 10
- 11 1. Whether the ALJ erred in finding claimant's degenerative changes in
12 his right foot to be non-severe?
- 13 2. Whether the ALJ erred in determining claimant had the residual
14 functional capacity to perform light work except that he could
15 stand/walk for two hours for 30 minutes at a time with the option to sit
16 down at work for a few minutes, and that he had no restrictions in
17 sitting?
- 18 3. Whether the ALJ erred in finding claimant able to perform past work
19 as a security guard/traffic controller, and in the alternative, at other
20 work as a surveillance system monitor, paramutual ticket checker, or
21 telephone solicitor?

22 Dkt. No. 13 at 1.

23

24 VII. DISCUSSION

25 A. The ALJ Did Not Err at Step 2 or in His RFC Determination

26 Plaintiff sustained a serious non-combat foot injury while in the United States Army in
27 November 2003. He was ultimately medically discharged from the Army in 2005, and was
28 awarded a 20% disability VA rating due to the injury, which was subsequently raised to 30%.
29 AR at 431-32. At Step 2 in the sequential disability review process, the ALJ found that
30 plaintiff's severe impairments were Lisfranc fracture in the right foot, status post
31 tarsometatarsal fusion in the right foot, and degenerative joint disease. AR at 12. The ALJ's
32 opinion also provides:
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1 His attorney suggests that he may have degenerative joint disease in joints
 2 adjacent to area where he was injured and subsequently treated. Provider
 3 Michael Picco, DO, wrote in a treatment note that the claimant has degenerative
 4 joint disease/stress injury in the midtarsal joint. Dr. Picco then explained,
 5

6 “I advised him that given the nature of his fusion he may have
 7 degeneration in the surrounding joints including the midtarsal
 8 joint over time and it could at some point require subsequent
 9 surgery for fusion of this...”

10 (Ex. 5F, p.8) (emphasis added [emphasis in original of ALJ opinion]). Dr.
 11 Picco did not diagnose the claimant with actual degenerative joint disease in the
 12 claimant’s surrounding joints. Medical expert Arthur Lorber, MD, testified that
 13 it is speculative with respect to whether the claimant will develop degenerative
 14 joint disease in his surrounding joints. Indeed, the record contains no objective
 15 evidence of degenerative joint disease in his surrounding joints.

16 Moreover, the light residual functional capacity encompasses the claimant’s
 17 alleged symptoms and limitations. Nothing in the record shows that his
 18 possible degenerative joint disease in surrounding joints has caused symptoms
 19 that are separate and distinct from those symptoms already associated with the
 20 above severe impairments. For example, provider M. Carrie (sic) Morantes
 21 already considered this possible surrounding joint degenerative joints disease
 22 condition when she determined that he is capable of performing light work.
 23 (Ex. 2F, p. 2; 15F). Adding degenerative joint disease in surrounding joints as a
 24 severe impairment would not alter his residual functional capacity.

25 AR at 13. Plaintiff argues that the failure to find degenerative changes in plaintiff’s
 26 right foot to be non-severe was error on the part of the ALJ. Dkt. 13 at 8. There are several
 27 problems with the plaintiff’s claim. First, as the ALJ noted, in October 2008, Dr. Picco’s notes
 28 indicate that he advised plaintiff that he “may have degeneration in the surrounding joints ...
 29 and it could at some point require subsequent surgery for fusion.” AR at 335. Dr. Picco went
 30 on to state that plaintiff would best be served by “modification of footwear, orthotics and
 31 possible corticosteroid injections.” *Id.* One month later, Dr. Picco sent a letter to the VA that
 32 urged a modification of his disability rating, and then stated “the patient has begun to develop a
 33 stress injury and arthritis in his adjacent joints in the midfoot and expect that he will continue
 34 to have problems with degenerative foot problems and progression of his arthritis throughout
 35 his lifetime.” AR at 332. In other words, there was no actual diagnosis beyond that found by

1 the ALJ. This is why the medical expert opined that development of degenerative joint disease
2 in surrounding joints was speculative at best during the hearing. AR at 13, 66. Plaintiff also
3 argues that a diagnosis would be supported by Dr. Connie Morantes, citing AR at 329.
4 However, Dr. Morantes makes no such diagnosis there or at any other part of the record. Dr.
5 Morantes also concludes that plaintiff is capable of performing full time work as long as he is
6 not standing. AR at 440.

7 At Step 2, an impairment can only be established if the “record includes signs—the
8 results of medically acceptable clinical diagnostic techniques such as tests –as well as
9 symptoms. *Ukolov v. Barnhart*, 420 F.3d 1002, 1005 (9th Cir. 2005). A diagnosis from an
10 acceptable medical source is a prerequisite to a finding that a medically determinable
11 impairment exists. *Id.* at 1005-06. As noted above, there is no such diagnosis.

12 Just as important, the ALJ considered the issue, and also determined that the RFC
13 would not change had there been such a finding. “Adding degenerative joint disease in
14 surrounding joints as a severe impairment would not alter his residual functional capacity.”
15 AR at 13. This means that even if the ALJ committed error at Step 2, it was harmless error
16 after considering the ALJ’s RFC determination. *Burch v. Barnhart*, 400 F.3d 676, 682-3 (9th
17 Cir. 2005).

18 Plaintiff argues that the RFC was deficient, or would be deficient, however, because it
19 failed to include a requirement that plaintiff’s right leg be elevated. The ALJ concluded that
20 leg elevation was not medically necessary, stating:

21 In another instance, he stated that he elevates his foot. He testified that if he
22 needed to fix a meal for his children, he would do it quickly, and then go back
23 to elevating his foot. He elevates his foot while eating as well. In fact, Dr.
24 Morantes, apparently in reliance on the claimant’s statements, opined that the
claimant needed to elevate his foot constantly. However, during the almost 1 ½
hour hearing, he did not elevate his foot or attempt to elevate his foot. Nor does

1 the medical record provide adequate support for having to elevate his foot as
2 frequently as he asserts.

3 . . .
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5 I find that he is able to perform light work as set forth above. Dr. Lorber [the
6 ME] stated that, based on his review of the record, the claimant can perform
7 light level work with some postural and environmental limitations....According
8 to Dr. Lorber, the evidence does not support a finding that the claimant must
elevate his foot. Although he tried to use compressive stockings in the past,
these stockings were admittedly not custom made. Dr. Lorber stated that
custom made stockings would have been more effective (June 2010 Hearing). I
give greatest weight to Dr. Lorber's opinion about foot elevation requirements
because he is an orthopedist and Dr. Morantes, while an examining provider, is
not an orthopedist.

9 AR at 15-16.

10 There is no dispute that the only reference to foot elevation is from Dr. Morantes
11 statement dated October 29, 2009. AR at 440. It is also clear that this single document was a
12 form of a "check the box" type of document, with nothing in her medical reports to sustain it.
13 Indeed, she circles the word "constantly" for need to manipulate right hand and left hand, even
14 though there is no alleged impairments of the hand. None of her other medical reports indicate
15 plaintiff is required to elevate his legs. No other physician reported the medical necessity of
16 plaintiff elevating his legs. Dr. Lorber specifically testified that it was not required.

17 The ALJ, after reviewing the medical record, concluded that this single statement was
18 apparently based on plaintiff's self-reporting. AR at 15. Because the ALJ found the plaintiff
19 to be less than fully credible, the appropriateness of plaintiff's RFC determination is dependent
20 upon the validity of that finding.

21 As noted above, credibility determinations are within the province of the ALJ's
22 responsibilities, and will not be disturbed, unless they are not supported by substantial
23 evidence. A determination of whether to accept a claimant's subjective symptom testimony
24 requires a two-step analysis. 20 C.F.R. §§ 404.1529, 416.929; *Smolen*, 80 F.3d at 1281; SSR

1 96-7p. First, the ALJ must determine whether there is a medically determinable impairment
2 that reasonably could be expected to cause the claimant's symptoms. 20 C.F.R.
3 §§ 404.1529(b), 416.929(b); *Smolen*, 80 F.3d at 1281-82; SSR 96-7p. Once a claimant
4 produces medical evidence of an underlying impairment, the ALJ may not discredit the
5 claimant's testimony as to the severity of symptoms solely because they are unsupported by
6 objective medical evidence. *Bunnell v. Sullivan*, 947 F.2d 341, 343 (9th Cir. 1991) (en banc);
7 *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1988). Absent affirmative evidence showing
8 that the claimant is malingering, the ALJ must provide "clear and convincing" reasons for
9 rejecting the claimant's testimony. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722.

10 When evaluating a claimant's credibility, the ALJ must specifically identify what
11 testimony is not credible and what evidence undermines the claimant's complaints; general
12 findings are insufficient. *Smolen*, 80 F.3d at 1284; *Reddick*, 157 F.3d at 722. The ALJ may
13 consider "ordinary techniques of credibility evaluation" including a reputation for truthfulness,
14 inconsistencies in testimony or between testimony and conduct, daily activities, work record,
15 and testimony from physicians and third parties concerning the nature, severity, and effect of
16 the symptoms of which he complains. *Smolen*, 80 F.3d at 1284; *see also Light v. Social Sec.*
17 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997).

18 The ALJ offered four reasons to support her adverse credibility determination: (1)
19 plaintiff stopped work for reasons other than his impairments; (2) plaintiff's daily activities
20 were inconsistent with his subjective complaints; (3) plaintiff did not elevate his foot during
21 the 1 ½ hour hearing; and (4) the objective medical evidence contradicted plaintiff's statements
22 regarding his symptoms and limitations. AR at 14-15.

23 The ALJ's proffered reasons are supported by substantial evidence in the record. First,
24 plaintiff self reported that he ceased working as a security guard because he was laid off and

1 further that he was terminated at the lumber mill because other people had seniority over him.
2 AR at 180. Plaintiff argues in reply that he testified that there were other physical reasons, in
3 addition to the layoffs, that contributed to the termination. AR at 73-74. This, however, does
4 not detract from the finding that the termination was not due to plaintiff's impairments. In
5 *Bruton v. Massanari*, 268 F.3d 824, 828 (9th Cir. 2001), the court held that the ALJ provided
6 "specific, cogent reasons" for an adverse credibility determination based on plaintiff's
7 statements "at the administrative hearing and to at least one of his doctors that he left his job
8 because he was laid off, rather than because he was injured."

9 Second, activities of daily living inconsistent with plaintiff's claimed limitations are a
10 basis for supporting an adverse credibility determination. *Rollins v. Massanari*, 261 F.3d 853,
11 857 (9th Cir. 2001). Plaintiff takes care of his two young children while his wife is at work.
12 He engages in shopping, laundry, household chores and cleaning. He takes his children to the
13 park, cares for himself and can drive. AR at 16, 77. Activities that are engaged in by a
14 claimant that are inconsistent with a claimed level of impairment are a proper basis upon which
15 to formulate an adverse credibility determination. 20 C.F.R. §404.1529 (c)(i). *Molina v.*
16 *Astrue*, 674 F.3d 1104, 1112-13 (9th Cir. 2012). The ALJ did not err by concluding that
17 plaintiff's daily activities undermined his claimed need for foot elevation and total disability.

18 Third, the ALJ observed plaintiff during the hearing, although the hearing was
19 conducted by video. The ALJ erred by concluding that plaintiff did not elevate his leg during a
20 1 ½ hour hearing. Instead, it was about 1 ¼ hour hearing. Nevertheless, reliance on this
21 observation as part of the overall credibility process is not error. Plaintiff cites *Orn v. Astrue*,
22 495 F. 3d 625 (9th Cir. 2007) for support of his claim that the ALJ committed error. However,
23 in *Orn*, the court held that the observations at the hearing alone may not form the "sole" basis
24 for discrediting a plaintiff's credibility, and because the remaining reasons offered by the ALJ

1 failed, personal observations alone were insufficient. *Id.* at 639-40. Here, the other reasons
2 offered by the ALJ withstand scrutiny. The use of the ALJ's observations was not the sole
3 basis for discrediting plaintiff's credibility. The ALJ did not err.

4 Fourth, as discussed above, the objective medical evidence contradicts plaintiff's
5 claims about his symptoms and limitations. Even Dr. Morantes concluded he could perform
6 full time work.

7 The role of this Court is limited. As noted above, the ALJ is responsible for
8 determining credibility, resolving conflicts in medical testimony, and resolving any other
9 ambiguities that might exist. *Andrews*, 53 F.3d at 1039. When the evidence is susceptible to
10 more than one rational interpretation, it is the Commissioner's conclusion that must be upheld.
11 *Thomas*, 278 F.3d at 954. While it may be possible to evaluate the medical evidence as
12 plaintiff suggests, it is not possible to conclude that plaintiff's interpretation is the only rational
13 interpretation. The ALJ did not err.

14 B. The ALJ Did Not Err at Steps 4 and 5

15 Plaintiff argues that because plaintiff would have to elevate his right foot to work, the
16 findings at Steps 4 and 5, which did not require foot elevation constitute error. Because the
17 Court has affirmed the finding of the ALJ on the issue of foot elevation, it must also conclude
18 there was no error at Steps 4 and 5 of the disability review process.

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VIII. CONCLUSION

For the foregoing reasons, the decision of the Commissioner is AFFIRMED and this matter is dismissed with prejudice.

DATED this 3rd day of October, 2012.

James P. Donohue
JAMES P. DONOHUE
United States Magistrate Judge